

Moving Beyond the Asylum Muddle

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James C. Hathaway Mo 14 Sep 2015

The [horrific images](#) of refugees dying on European shores seem – finally – to have galvanized public opinion in favor of a shift to protection rather than deterrence. Some leaders seem still to be committed to harsh action – Hungarian Prime Minister Orban’s comment that the arrival of refugees threatened “Europe’s Christian roots” and the decision of Czech officers to use indelible ink to write numbers on the hands of refugees, reminiscent of the Nazi tattooing of Jews and other minorities, being especially odious examples.

But the proverbial tide does seem to have turned. Pro-refugee marches in Vienna, Icelanders demanding that their government let them open their homes to refugees, and English and German football fans displaying banners welcoming refugees to join them at matches seem to have paved the way for the momentous announcement by Austria and Germany that those countries would open their doors to refugees trapped in Hungary. German Chancellor Merkel has emerged as the voice of reason, rightly insisting that the protection of refugees “is morally and legally required” of all state parties to the Refugee Convention.

What now?

First, it is important not to simply go back to “business as usual” when the immediate humanitarian emergency ebbs. The current pressures will abate as some states – inside and beyond Europe, as recent French and Argentinian responses attest – will inevitably follow the Austrian and German lead and open their doors to at least some refugees. The impending arrival of winter weather will moreover stymie the ability of many refugees – in particular, the most vulnerable – to travel to safety. While relative calm has historically inclined governments to return to their protectionist ways, the failure to seize this moment to minimize the risk of future protection tragedies would represent a serious ethical lapse.

Second, we must be clear that there is no need whatever to renegotiate the UN’s landmark Refugee Convention. Its definition (“a well-founded fear of being persecuted” for discriminatory reasons) has proved wonderfully malleable, identifying new groups of fundamentally disfranchised persons unable to benefit from human rights protection in their own countries. At least as important, its catalog of refugee-specific rights remains as valuable today as ever. The underlying theory of the Refugee Convention is emphatically *not* the creation of dependency by hand-outs, much less the ongoing detention of refugees in camps. It is rather oriented to enabling refugees to become self-reliant through mobility, education, work – and includes rights that speak quite specifically to the real vulnerabilities and needs of those forced to live outside their own national community. It would be a travesty of epic proportions to contemplate the renegotiation of this treaty.

This leads to the critical third and most important point. Not only governments – but most tragically, even the international refugee agency, UNHCR – have been inattentive to the fact that the drafters of the Convention never intended the treaty to operate in the atomized and uncoordinated way that has characterized most of its nearly 65-year history. To the contrary, the Preamble to the Refugee Convention expressly recognizes that “the grant of asylum may place unduly heavy burdens on certain countries,” such that real global protection “cannot therefore be achieved without international co-operation.” Action to realize this promise in the Refugee Convention’s Preamble is more important now than ever.

It is, of course, patently unfair that countries such as Greece or Hungary be expected to assume most of Europe’s responsibility under the EU’s so-called “first country of arrival” rule, which forces refugees to stay in the first place they arrive – whatever that country’s resources, and whatever protection is realistically available there (or not). But in all of the talk about the European refugee crisis, we have lost sight of the fact that just three countries bordering Syria – Jordan, Lebanon, and Turkey – have received *more than ten times* as many Syrian refugees as the rest of the world combined. Indeed, more than 80% of the world’s refugees live in countries of the less developed world and are guaranteed no financial support from wealthier countries. Nor are these front-line states meaningfully assisted by resettlement. Of the roughly 14,000,000 refugees in the world last year, only

about 100,000 were resettled – with just two countries, the United States and Canada, providing the lion's share of this woefully inadequate contribution.

Nearly twenty years ago, I had the honor to lead of team of lawyers, social scientists, nongovernmental activists, and governmental and intergovernmental officials – drawn from all parts of the world, and including refugees themselves – [who worked for five years to conceive the model for a new approach to implementing the Refugee Convention](#). Despite the fact that consensus on a comprehensive means to operationalize the treaty was reached, no action was taken by either the UNHCR or governments to move the project forward on the international stage. While the model we conceived can no doubt be improved, I believe that it offers a sound basis to launch the effort to devise a more managed system of global refugee protection, predicated on true and dependable sharing of burdens and responsibilities.

First, we should plan for, rather than simply react to, refugee movements. Specifically, drawing on insurance-based logic, the international refugee system should commit itself to predetermined burden (financial) sharing quotas; pre-determined responsibility (human) sharing quotas; a revitalized UNHCR to administer quotas, with authority to allocate funds and refugees based on respect for legal norms; and encouragement of a shift to common international refugee status determination system and group *prima facie* assessment to reduce processing costs, thereby freeing up funds for real and dependable support to front-line receiving countries.

Second, we should be clear that this is a system for which migration is the means to protection, not an end in and of itself. This means that there must be no barriers to entry – refugees should be understood to have the right to arrive wherever they are able to reach, and that there should be no penalties for unlawful arrival or presence, though managed entry regimes ought to be promoted where feasible. Without barriers to entry, the market for smugglers and traffickers will be significantly reduced: people mortgage their futures and risk their lives now only because there is in most cases no realistic alternative to gain entry to a safe country. On the other hand, protection for duration of risk should be the operational norm, with immediate permanent integration required only in exceptional cases (unaccompanied minors, torture victims, etc). Mandated repatriation should be understood to be permissible where the cessation standard is met within 7 years of arrival, routinely accompanied by a guarantee of repatriation and development assistance. But if refugee status cannot be lawfully ended on the basis of a durable and fundamental change of circumstances at the 7 year point, residual resettlement or local integration must be guaranteed to those still at risk, enabling them to remake their lives with security.

Third, as an interstate regime, refugee protection should be operationalized in a way that maximizes its compatibility with state interests. Under the model, there is no necessary connection between the place in which a refugee arrives and first presents her claim and the country where – assuming she is a refugee – she would benefit from protection for the duration of risk. By severing the connection between the place where a refugee arrives and the state in which protection is afforded (for example, a refugee arriving in Miami might be protected in Costa Rica) the logic of disguised economic migration via the refugee procedure is undermined. We should also harness the ability and willingness of different states to contribute in different ways. Rather than asking all states to take on the same protection roles, the core of the renewed regime should be common but differentiated responsibility. Beyond the common duty to provide first asylum, states could assume a range of protection roles within their responsibility-sharing quota (protection for duration of risk; exceptional immediate permanent integration; residual resettlement).

All states would, however, be required to make contributions to both (financial) burden-sharing and (human) responsibility-sharing, with no trade-offs between the two. If we are serious about avoiding continuing humanitarian tragedy – not just in Europe, but throughout the world – then the present atomized and haphazard approach to refugee protection must end. The moment has come *not* to renegotiate the Refugee Convention, but rather at long last to *operationalize* the treaty in a way that works dependably, and fairly.

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